

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8259 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? - YES
2. To be referred to the Reporter or not? - YES
3. Whether Their Lordships wish to see the fair copy of the judgement? - NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? - NO
5. Whether it is to be circulated to the Civil Judge? - NO

ABDULKARIM GULAMNABI MANSURI .

Versus

JANATA COMMERCIAL CO-OP.BANK LTD.

Appearance:

MR MC BHATT for Petitioner
MR AMIT M PANCHAL for Respondent No. 1
MR KM PATEL for Respondent No. 2
GOVERNMENT PLEADER for Respondent No. 3

CORAM : MR.JUSTICE R.A.MEHTA

Date of decision: 16/04/98

ORAL JUDGEMENT

The petitioner was appointed as the Manager of the first respondent - Co-operative Bank, in the year 1982. The second respondent is the Chairman of the first respondent Bank.

2. According to the petitioner, on or about 1st October 1989, the second respondent became the Chairman of the respondent Bank and he was having the liability of Rs.4 lakhs towards the respondent Bank. According to the petitioner, the petitioner was discharging his duties sincerely and honestly and he was persuing the respondent no.2 for recovering all the dues of the Bank. This approach of the petitioner had antagonised the second respondent and, in turn, other persons in charge of the management of the respondent Co-operative Bank. It is the case of the petitioner that the second respondent was determined to remove the petitioner anyhow and to appoint a more favourable and pliable person in his place. The second respondent manipulated certain false charges against the petitioner and the charge sheet was issued. The petitioner had filed a detailed reply and requested for appointment of an impartial officer as Inquiry Officer and suggested the appointment of a retired Judge or a senior Executive Officer.

3. Instead of holding and completing the inquiry, the respondent Bank adopted the short-cut practice and passed the impugned order of dismissal of the petitioner from service, dated 26th November 1990 (Annexure.D to the petition). Earlier, the petitioner was placed under suspension when the inquiry was initiated. The present petition is filed against the order of dismissal from service as the Manager of the respondent Co-operative Bank.

4. Annexure.D, the order of termination is titled as the order of dismissal and the body of the order states that, during the course of the audit of the Accounts of the Bank when the petitioner was the Manager, it was found that the petitioner had misused his office and there was mal-administration and mis-appropriation of large funds and he had caused damage to the prestige of the Bank. It is further stated that because of such mal-practices of the petitioner and mis-appropriation of large funds, the Bank had suffered huge economic loss. It is also stated that the petitioner was served with a charge-sheet on 1st October 1990 and the departmental inquiry was started, however, it was not possible to continue the petitioner in service having regard to the nature of his office and gravity of the allegation and, therefore, he was relieved of his services by dismissal.

5. It is contended that, Clause 47.1 of the Bye-laws of the respondent Bank provides for appointment, dismissal, resignation of Manager, Managing Director and

Chief Executive Officer by the Managing Committee, after obtaining prior approval of the Registrar of the Co-operative Societies. It is submitted that in the present case, the above procedure has not been followed and, therefore, the order of termination is illegal. It is also submitted that, the termination is penal and is without holding any inquiry and in gross breach of the principles of natural justice.

6. On behalf of the respondents, it is contended that the petitioner is involved in grave mis-appropriation of large funds and it was impossible to continue him in service. In any case, it submitted that the procedural lapse or breach of Bye-law 47.1 would not entitle the petitioner to maintain a writ petition against the respondent Bank, which is not a State or authority of the State or instrumentality of the State. It is also submitted that, the only remedy of the petitioner is to approach the ordinary forum and not the High Court under Article 226 of the Constitution of India. It is further submitted that, the petition for enforcement of the Bye-laws is not maintainable and it is submitted that the provisions of the Bye-laws are contractual and breach of the provisions of the Bye-laws or the breach of contract would not entitle an aggrieved party to invoke the writ jurisdiction of this Court.

7. Several decisions have been cited by the respondent Bank to show that the Co-operative Bank is not a State or authority or instrumentality of the State and, therefore, Article 12 and 13 of the Constitution would not be applicable and no writ petition could be maintainable for enforcement of the Bye-laws. Therefore, the fundamental rights and remedies which are available against the State and instrumentalities of State are not available against a person, co-operative society and Co-operative Bank.

8. But the question is whether the petition under Article 226 of the Constitution is maintainable or not. Article 226 provides that, every High Court shall have the power to issue writ to any person or authority, including writs in the nature of Mandamus for any purpose. It is, therefore, submitted that under Article 226, the High Court can issue a writ of mandamus to any person or authority for the purpose even other than enforcement of the fundamental rights. Reliance has been placed on the judgment of this Court in the case of K.S. JOY vs. INDIAN INSTITUTE OF MANAGEMENT, 1994 (1) GLH 57. It was also a case of termination of service by an Institution, namely, Indian Institute of Management and

the question was whether the petition was maintainable or not, against the Institute.

8. In that case, there was a statutory provision contained under Section 51A of the Gujarat University Act, which was somewhat similar to the provisions of the present Bye-law 47.1. Section 51A of the Gujarat University Act provides that, no member of teaching, other academic and non-teaching staff of the an affiliated College and the recognised or approved institution shall be dismissed or removed or reduced in rank except after an inquiry. Sub-section (2) of Section 51A provides that, no termination of service of such member shall be done unless such termination is approved by the Vice Chancellor.

9. In that case, the approval of the Vice Chancellor was not obtained and the petition was allowed, even without examining the question whether the Institute was State within the meaning of Article 12 of the Constitution of India and it was held that Article 226 covers any other person or body having public duty and the form of the body concerned is not much relevant. No matter by what means the duty is imposed. If a positive obligation exists, mandamus cannot be denied.

10. For holding so, reliance was placed on the Supreme Court judgment in the case of SHRI ANADI MUKTA SADGURU S.M.V.S.J.M.S. TRUST vs. V.R. RUDANI, reported in AIR 1989 SC 1607. Therein it is held that, "any person or authority" occurring in Article 226 of the Constitution of India are not to be confined only to statutory authorities and instrumentalities of the State and these words may cover any other person or body performing public duty. The form of the body concerned is not much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligations owed by the persons or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. The Court held that the petitioner was entitled and the mandamus was issued against the Indian Institute of Management as "any person" under Article 226.

11. On behalf of the respondents, it is submitted that, the Bye-laws of the respondent Bank are contractual and, therefore, for enforcement of the Bye-law, this petition would not be maintainable. Reliance is placed on the judgment of the Supreme Court in the case of CO-OPERATIVE CENTRAL BANK LTD. AND ORS., ETC. vs.

ADDITIONAL INDUSTRIAL TRIBUNAL, ANDHRA PRADESH, HYDERABAD AND ORS., reported in AIR 1970 SC 245. In that case, it was found that some of the service conditions were laid down in the Bye-laws of the Bank and the Industrial Tribunal had granted relief to the workmen, amounting to varying the conditions of service and altering the same. The Counsel for the Co-operative Bank had argued that the Bye-laws had the force of law and the Industrial Tribunal could not have altered the Bye-laws and could not have given any directions contrary to the Bye-laws. The Supreme Court held that the Industrial Tribunal had the power to alter the terms and conditions of the Contract and also the Bye-laws relating to the terms and conditions of the service. The Supreme Court held that the Bye-laws of the Co-operative Society were similar in nature to the Articles of Association of a Company and such Articles have never been held to have the force of law.

12. It is thus clear that the Bye-laws of the Co-operative Society and its conditions of service do not have the force of law. Still the question will remain as to whether that Bye-law 47.1 casts any public duty on the Bank and whether mandamus can issue to enforce that public duty so as to secure performance of the public duty.

13. The learned Counsel for the respondent Bank has submitted that, in the case of K.S.Joy (supra), the provision was statutory, i.e. Section 51A(2) of the Gujarat University Act, requiring prior approval of the Vice Chancellor, for termination of service. In the present case, the provision is not any statute, but only in the Bye-law not having force of law. In that case, the corresponding provision was in the statute. The public duty to obtain prior approval of the Vice Chancellor before termination was cast by a statutory provision. In the present case, there is no statutory provision and the similar obligation cast on the Bank is by the Bye-law which is contractual and non-statutory. However, as discussed earlier, the Division Bench considered in paragraph 7 of the S.C. judgment in the case of Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust (supra) and held that what is relevant is the nature of the duty imposed on the body and not what manner and form and by what means the duty is imposed. Therefore, it would not make any difference either in substance or in principle as to how the duty is imposed, by what means and what form. The question would be whether, the duty imposed by Bye-law 47.1 is a public duty. Mandamus can be issued to see that the public duty is performed and

its breach is set aside. In that case, the positive obligation was in the statutory provision and was held to be public duty and the mandamus was issued. In the present case, the same duty is cast as public duty by the Bye-laws and not by any statutory law. It is a nature of the duty which would determine whether it is public duty or not. The obligation and duty is the same whether under the statute or Bye-law.

14. The learned Counsel for the respondent Bank has also relied upon the Division Bench Decision in the case of AMRELI DISTRICT CO-OPERATIVE SALE & PURCHASE UNION LTD. & ORS. vs. STATE OF GUJARAT, reported in 1984 (2) GLR 1244. In the said decision, the provision of the Gujarat Co-operative Societies Act, 1961 by Amending Act of 1982, was challenged. Section 76A which was added provided that any appointment or removal of a Managing Director or a Chief Executive Officer or a person exercising the powers and performing the functions and duties of such Director or Officer made without the previous approval of the Registrar shall be void. This provision has been struck down as violative of Article 19(1)(c) and (g) of the Constitution. It is, therefore, submitted that when the statutory provision similar to Article 47.1 is void, this provision which is virtually para materia with Section 76A cannot give any cause of action to the present petitioner.

15. It has to be noticed that, the statutory provision contained in Section 76A was held to be violative of Article 19(1)(c) [freedom to form Associations or Unions] and (g) [freedom to practice any profession]. In the present case, it is the Bye-law enacted by the Society itself and, therefore, it cannot be said that the Bye-law framed by the members of the Society itself is violative of freedom of Members of the Society.

16. It is submitted that this Bye-law 47.1 was added at the instance of the Registrar's direction under old Section 160 of the Gujarat Co-operative Societies Act. This direction was issued in 1982 prior to the amendment and prior to the judgment in the Amreli case. That direction is complied with by the respondent bank and the amendment has been incorporated in the Bye-law. It is submitted that the Registrar could not have issued a direction virtually requiring the society to have the provision of Section 76A. This Bye-law is not challenged by any one nor the direction of the Registrar. In fact, the judgment in the Amreli Case deals with the new Section 160 which wholly substituted the original Section

160. The original Section 160 was materially different and the direction was issued under that original Section. The Division Bench considered the original Section in contrast to the new Section 160 and held in para 86 that, "the old section insofar as it provided an obligation of obtaining prior approval of the State Co-operative Council was a very healthy and a necessary safeguard against the power of the Registrar of issuing directions becoming too arbitrary and subjective." Therefore, as far as the provision of old Section 160 and the direction issued is concerned, it was held to be necessary and healthy safeguard. As per old & valid Section, the direction was issued. So far as the new Section 160 is concerned, sub-sections (1) and (2) are somewhat similar to original sub-sections (1) and (2). Sub-section (3) and (4) were totally new provisions which provided for removal of the Managing Committee committing breach, etc., the Division Bench held these two sub-sections (3) and (4) to be ultra vires and sub-sections (1) and (2) were upheld. As far as original Section 160 is concerned, it was not challenged, and it was held that the old Section was necessary safeguard against the power of the Registrar becoming too arbitrary and subjective. This power is exercised by the Registrar in this case after approval from the State Co-operative Council.

17. This direction throws ample light on the nature of the duty imposed on the Bank (Annexure.E dated 18th March 1982). The Registrar has issued the direction after obtaining prior approval from the Gujarat State Co-operative Council. It says that there was rapid increase in the number of Co-operative Banks in the State. Appointment/removal of Chief Executive Officer, Manager etc., and the power of appointment/removal of them was vested in the Board of Directors and it had come to the notice that since there was no check of prior approval of the Registrar, the key officers of the Bank have not been able to act independently in the interest of the Bank and serious irregularities were noticed by the RBI and the incidents have come to light where office bearers of the Co-operative Banks had made certain transactions in arbitrary manner and contrary to the interest of the people and institution. It was realised that the Chief Officer of the Bank and competent officers would not be able to work independently. Therefore, in the interest of good administration of the Co-operative Banks, it was felt necessary that the reasonable protection was required to be given to such officers. Therefore, the direction was required to be issued after obtaining the prior approval of the Gujarat State Co-operative Council. From these recitals it is clear

that, the Gujarat State Co-operative Council was aware of the progress in the co-operative public financial institutions as well as the public danger without affording protection to the key managerial personnel to function independently.

18. The learned Counsel for the respondents submitted that the Bye-laws cannot be said to cast any public duty and the Bye-laws are for the internal working of the Co-operative Bank and Society; the Co-operative Bank deals with only its members and not the public at large and it cannot be said to be public duty. It is not possible to accept this submission. The co-operative Banks occupy very important position in the financial and economic scene of the State. The Co-operative Banks have become not only important power centres but they are virtually public financial institutions dealing with crores of public finance of large section of public. The need to regulate such financial institutions is an imperative need of the country. In absence of proper check, the office bearers of the Bank can indulge in doing irregularities. The key persons who can check these are the Manager and the Managing Director. If such persons are not protected, they would not be able to act independently. It is with a view to afford the necessary protection and enable them to act independently that this Bye-law has to be enacted. This is certainly a public duty.

19. Apart from the fact that old Section 160 gives power to the Registrar to issue directions. It has been adopted and incorporated by the respondent Co-operative Bank in its Bye-laws and it does not lie in the mouth of the respondent Bank to say that it would not comply with the same or contend that the Bye-law cannot be enforced as public duty. Under Article 226 of the Constitution the mandamus can be issued even though it may not be an authority of the State.

20. In the light of the above discussion, the conclusion is inevitable that the impugned order of dismissal of the petitioner is contrary to and in gross violation of Bye-law 47.1 of the respondent Bank and in breach of public duty and is illegal and void. It is hereby set aside. The petitioner, is therefore, entitled to be reinstated in service with all consequential benefits as if the impugned order of dismissal has never been passed. The respondent Bank is directed to reinstate the petitioner to his original post with continuity of service and full back wages as if he had continued in service.

21. The petition is allowed. Rule is made absolute accordingly, with costs.

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